No. 80-1797

MAY 28 1981

ALEXANDER L. STEVAS
Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RYAN OUTDOOR ADVERTISING, INC.,
Appellant,

vs.

SALINAS, A Municipal Corporation,
Respondent.

MOTION TO DISMISS OR AFFIRM

STEPHEN A. LANKES
COUNSEL OF RECORD
HOLBROOK & LANKES
21 West Alisal Street, Suite 104
Salinas, CA 93901
Telephone: (408) 758-0903

DAVID M. KENNEDY
CITY ATTORNEY, CITY OF SALINAS
200 Lincoln Avenue
Salinas, CA 93901
Telephone: (408) 758-7256
Attorneys for Respondent

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-8300

TABLE OF CONTENTS

	Page
I	
Opinions below	1
II	
Jurisdiction	2
III	
Statement of facts	2
A. The Salinas Ordinances and General Commercial (C-G) Zoning Districts	2
B. Essential facts about Ryan's business	4
IV	
The appeal does not present a substantial federal question	6
A. The Ordinance does not violate the First Amendment	6
B. Appellant is not entitled to compensation for the removal of its signs	8
V	
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Adderly v. Florida, 385 U.S. 39 (1966)	7
Art Neon Co. v. City and County of Denver (1973) 488 F.2d 118	9, 10
Cameron v. Johnson, 390 U.S. 611 (1968)	7
Carter v. Gallagher (1971) 337 F.Supp. 626	8
Cox v. Louisiana, 379 U.S. 559 (1965)	7
Thomas Cusack Co. v. Chicago, 242 U.S. 256 (1916)	6
Grayned v. Rockford, 408 U.S. 104 (1972)	7
Livingston Rock & Gravel Co. v. County of Los Angeles (1954) 43 Cal.2d 121, 272 P.2d 4	9
City of Los Angeles v. Gage (1954) 127 Cal.App.2d 442, 274 P.2d 34	9
Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 610 P.2d 407, 164 Cal.Rptr. 510 (1980)	6
Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977)	6
National Advertising Co. v. County of Monterey (1970) 1 Cal.3d 875, 464 P.2d 33	9, 10
People v. Adco Advertisers (1973) 35 Cal.App.3d 507, 110 Cal.Rptr. 849	9

Table of Authorities Cited

Cases

	Page
County of Santa Barbara v. Purcell (1967) 251 Cal. App.2d 169, 59 Cal.Rptr. 345	9
Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263 (1977)	6
Sun Oil v. United States (1978) 572 F.2d 786	9
Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303	8, 9

Constitution

United States Constitution, First Amendment	6, 7

Statute

28 U.S.C. Section 1257(2)	2

Other Authorities

City of Salinas Ordinance:	
No. 1103	2, 3, 4
No. 1488	3
Salinas City Code, Chapter 37	2

No. 80-1797

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RYAN OUTDOOR ADVERTISING, INC.,
Appellant,

VS.

SALINAS, A Municipal Corporation,
Respondent.

MOTION TO DISMISS OR AFFIRM

The Respondent (hereinafter, the City of Salinas) moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Appeal of the State of California for the First Appellate District on the grounds that the appeal does not present a substantial federal question and that the decision below is correct.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (hereinafter, Ryan) Jurisdictional Statement.[1]

[1]References herein to appendices are those attached to the Jurisdictional Statement. "Jur.St." followed by a number refers to pages of the text of the Jurisdictional Statement.

II

JURISDICTION

Jurisdiction is asserted by Ryan under Title 28, United States Code § 1257 (2). (Jur. St. 2.)

III

STATEMENT OF FACTS

A. The Salinas Ordinances and General Commercial (C-G) Zoning Districts

On March 5, 1962, the City Council of the City of Salinas adopted Ordinance No. *1103* (N.C.S.), a comprehensive land use zoning ordinance based upon the General Plan for the City and enacted to promote the public health, safety, morals, comfort and general welfare of its citizens. The ordinance, which became effective April 5, 1962, has been codified as Chapter 37 of the Salinas City Code, and has been amended on occasions since its adoption, but the basic provisions which applied in 1962, have been continued. Ordinance No. *1103* (N.C.S.) permitted off-site signs and billboards only in the General Commercial (C-G) zoning districts and, upon obtaining a use permit therefore, in the Unclassified (U) zoning district. Off-site signs and billboards in existence in other zoning districts on the effective date of the ordinance were declared to be nonconforming uses and public nuisances and their removal was required within five years of the effective date of the ordinance. (Jur.St. 29 [a]).

In 1971, the City Council of the City of Salinas appointed a sign study committee to review Ordinance No. *1103* (N.C.S.) and that committee participated in the formula-

tion of the provisions of Ordinance No. *1488* (N.C.S.), adopted August 16, 1971, which amended, in part, Ordinance No. *1103* (N.C.S.). A Ryan representative was a member of that sign study committee, and that representative advised the City Council of the City of Salinas that the proposed Ordinance No. *1488* was a reasonable regulation of off-site advertising and that the adoption of the ordinance was supported although the representative was not in complete agreement with all of its provisions. (Jur.St. 29[a]; 32[a]).

Ordinance No. *1488* (N.C.S. defined the term "off-site" sign to mean a sign whose sponsor does not maintain offices and/or provide services at the site of the sign. It reaffirmed the basic provisions of Ordinance No. *1103* (N.C.S.), continued the prohibition of off-site signs in all districts except the C-G and U districts, continued the five-year amortization with the further provision that all non-conforming signs, those already fully amortized, should be removed forthwith and should not receive the benefit of a new amortization period. Ordinance No. *1488* (N.C.S.) also provided that no off-site sign may exceed 22 feet in height. (Jur.St. 29[a]; 30[a]).

The General Commercial (C-G) zoning districts are located substantially near the core of the City and border six major, heavily traveled streets with a length of six miles when combining both sides of each street. The C-G zoning districts comprise 3% of the City's total area and 6% of the City's non-residential area. (Jur.St. 31[a]).

Two of the major streets bordering the C-G zoning districts, Market Street and John Street, are State Highways (Highways 183 and 68 respectively).

B. Essential Facts About Ryan's Business

Ryan claims that its outdoor advertising structures in Salinas consist of signs in "thirty-four physical locations." (Jur.St. 5). That claim is incorrect. Ryan maintained off-site outdoor advertising signs at forty-four locations in the City at the time of trial. (Jur.St. 30[a]). That number is now forty-three as discussed below. Ryan's Map (Jur.St. Appendix F) has symbols for signs located at forty-one locations. Ryan's claim that it has thirty-four sign locations was first erroneously made to the Court of Appeal below and has been carried forward without correction.

Prior to the decision of the Court of Appeal below, Ryan removed several sign structures located at one physical location which were signs subject to the within litigation (Jur. St. 5[a], 6[a]), thereby reducing the number of physical sign locations from forty-four to forty-three, including eighteen "A" Series sign locations. The "A" Series signs are the subject of the within action.

The record below reflects that the "A" Series signs were in existence on April 5, 1962, the effective date of Ordinance No. *1103* (N.C.S.).

Ryan purchased the sign structures at issue in 1965, at least three years after they had been declared nonconforming. (Jur.St. 3[a]).

The population of the City of Salinas was 74,000 persons at the time of trial. (Jur.St. 30[a]).

Ryan's expert witness, Haskell Barry, testified that all of Ryan's signs reached the equivalent of 75% of the total population of the City of Salinas daily or 55,500 persons. He further testified that Ryan's signs in the permitted C-G district reached the equivalent of a "weak" 50% of the total population of the City of Salinas daily, or 37,000 persons. If all of Ryan's nonconforming signs (27), the "A" and "B" Series, were eliminated, leaving only the 16 structures within the C-G districts, Ryan's exposure in Salinas would be reduced by only 33% (from 55,500 persons daily to 37,000 persons).

All of Ryan's signs in the C-G districts exceed the 22-foot height limitation. Ryan states that the standardized height of billboards in the industry is not less than 35 feet (Jur.St. 4) and that its "C" Series signs could not be lowered and still maintain industry visibility standards (Jur. St. 6).

Ryan's witness testified that the height of its 16 signs in the permitted C-G districts was "25, 26 feet" or just 3 to 4 feet higher than required by the City of Salinas. He further testified that Ryan had never sought an amendment to the ordinance to seek accommodations for the signs and that the City of Salinas has never asked that the height limitation be complied with. The lower Court concluded that the twenty-two foot height restriction is not unreasonable or arbitrary. (Jur.St. 33[a]).

IV

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Ordinance Does Not Violate the First Amendment

The case of *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263 (1977) upheld a community-wide ban on off-site billboards and this Court dismissed the appeal therefor for want of a substantial federal question. (439 U.S. 808). However, in another case upholding a community-wide total ban of outdoor advertising structures, *Metromedia, Inc. v. City of San Diego,* 26 Cal.3d 848, 610 P.2d 407, 164 Cal.Rptr. 510 (1980) this Court noted probable jurisdiction, 66 L.Ed.2d 127 (Oct. 14, 1980) (No. 80-195), and a decision is now pending on appeal before this Court.

Salinas considers the correct rule to be that a prohibition of off-site billboards does not violate the First Amendment.

However, unlike the San Diego ordinance in the *Metromedia* case, the Salinas ordinance is *not* a total ban ordinance, as it allows off-site signs in the General Commercial, "C-G" district and in the unclassified "U" district, reaching the view of some 37,000 persons daily.

Ryan, as it must, concedes that there may be a legislative ban on billboards in certain scenic sections of the city or, more generally, to the non-commercial districts (Jur.St. 18), citing *Thomas Cusack Co. v. Chicago,* 242 U.S. 256 (1916) (billboards may be prohibited in "residence districts"); *Modjeska Sign Studios, Inc. v. Berle,* 43 N.Y.2d 468, 473, 373 N.E.2d 255, 257, 402 N.Y.S.2d 359, 362 (1977)

(billboards may be excluded to "ensure the natural beauty" of park areas), appeal dismissed, 439 U.S. 809 (1978).

The Salinas ordinance does allow, as the facts demonstrate, the coexistence of billboards and traffic and aesthetic concerns within First Amendment values without imposing the "grievous burden" on those interests that concerned the concurring judge in the case of *Donnelly & Sons v. Campbell,* No. 79-1575, Concurring Slip Op at 19 (1st Cir. Dec. 22, 1980) (Pettine, J., concurring.)

The typical time, place, or manner restriction involves some limitation on a mode of expression. *Id.* at 5; e.g., *Grayned v. Rockford,* 408 U.S. 104, 116-21 (1972) (anti-noise ordinance involving grounds adjacent to school); *Cameron v. Johnson,* 390 U.S. 611 (1968) (Picketing that unreasonably interferes with access to public buildings); *Adderly v. Florida,* 385 U.S. 39 (1966) demonstrations on jailhouse grounds); *Cox v. Louisiana,* 379 U.S. 559 (1965) picketing or parading near courthouse).

The Salinas ordinance is merely "quantitative"; it reduces the number of Ryan's existing signs from 43 to 16, and reduces exposure by 33%, or from 55,000 persons daily to a mere 37,000 persons daily. The Salinas ordinance is a proper time, place or manner restriction, valid under any criteria.

Ryan argues that the 22-foot height limitation effectively destroys its operation as a consultant recommends a height not less than 35 feet. (Jur.St. 4).

The height limitation question is simply a non-issue for the reasons that the average height of Ryan's signs in the

"C-G" district was "25-26 feet", that Ryan has never requested the City of Salinas to consider an amendment of the ordinance to accommodate its signs, and that the City of Salinas has never asked or demanded that Ryan meet the twenty-two foot height limitation. In any event, should the height limitation be found to be unreasonable, arbitrary and unconstitutional, it could be severed from the balance of the ordinance. *Carter v. Gallagher* (1971) 337 F.Supp. 626, 629.

Ryan implies in its Jurisdictional Statement that a reduction of its sign market in Salinas would render its operation uneconomical as the Salinas market represents fifty-percent of its advertising plant in the California Central Coast region (Jur. St. 2, 3). However, the record below reflects that Ryan has no billboards in the cities of Monterey (the second largest city in Monterey County), Carmel-By-The-Sea, and Pacific Grove, each in Monterey County, each in the Monterey-Salinas area and each in the California Central Coast region, as each of these cities has a total city ban on outdoor billboards and that, for "political" and "PR" reasons, Ryan has moved away from those communities.

The City of Salinas does not concede that it has any obligation at all to allow additional areas for Ryan's billboards outside of the "C-G" and "U" districts so that Ryan can make up for the lack of billboards in those cities.

B. Appellant Is Not Entitled to Compensation for the Removal of Its Signs

Regulation of signs through a general zoning ordinance is a valid exercise of the City's police power. *Village of*

Euclid v. Amber Realty Co. 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. Elimination of nonconforming uses in California is generally accomplished through removal of the use without compensation following a reasonable amortization period. *National Advertising Co. v. County of Monterey,* (1970) 1 Cal.3d 875, 464 P.2d 33.

Just compensation paid under eminent domain law (taking of property) is to be distinguished from the police power (regulation of property). If the regulation of property is unreasonable or arbitrary as it relates to private property, then the law of eminent domain may apply. *Sun Oil v. United States* (1978) 572 F.2d 786.

Although Ryan's signs had a five-year amortization period commencing April 5, 1962, those signs are still in existence as of the date of this appeal, over 19 years later.

Use of a five-year amortization period for removal of nonconforming outdoor signs is reasonable, is not arbitrary and does not require just compensation. *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 274 P.2d 34 (5 years to cease plumbing business upheld); *County of Santa Barbara v. Purcell* (1967) 251 Cal.App.2d 169, 59 Cal.Rptr. 345 (5 year amortization of billboards upheld); *National Advertising Co. v. County of Monterey,* supra, (1970) 1 Cal.3d 875, 464 P.2d 33, 83 Cal.Rptr. 577 (1 year amortization of billboards upheld); *People v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 110 Cal.Rptr. 849 (2 year, 8-month billboard amortization upheld); *Livingston Rock & Gravel Co. v. County of Los Angeles* (1954) 43 Cal.2d 121, 272 P.2d 4 (20 year amortization for removal of cement mixing plant upheld); *Art Neon Co. v.*

City and County of Denver (1973) 488 F.2d 118 (5 year amortization of billboards upheld).

Ryan had the burden of presenting evidence that the amortization period was unreasonable. *National Advertising Co. v. County of Monterey,* supra, at page 879. Ryan made no attempt to meet its burden at the trial level. (Jur. St. 10[a]).

V

CONCLUSION

Ryan fails to raise any issue not adequately decided below on state grounds or representing a substantial federal question. Wherefore, the City of Salinas respectfully submits that the instant appeal should be dismissed or, alternatively, the judgment below should be affirmed.

Dated: May 26, 1981

At Salinas, California

Respectfully submitted,

STEPHEN A. LANKES
HOLBROOK & LANKES
COUNSEL OF RECORD

DAVID M. KENNEDY
CITY ATTORNEY, CITY OF SALINAS
Attorneys for Respondent